

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      MARCH 23, 99

U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re **Dynamic Metal Treating, Inc.**

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Serial No. 75/095,740

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Douglas W. Sprinkle and Julie A. Greenberg of Gifford,  
Krass, Groh, Sprinkle, Patmore, Anderson & Citkowski for  
applicant.

Elizabeth A. Dunn, Trademark Examining Attorney, Law Office  
**109** (Deborah S. Cohn, Managing Attorney).

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Before Quinn, Wendel and Bucher, Administrative Trademark  
Judges.

Opinion by **Quinn**, Administrative Trademark Judge:

An application has been filed by Dynamic Metal  
Treating, Inc. to register the mark MICRO-TEC for the  
services of "applying protective coatings to metal."<sup>1</sup>

The Trademark Examining Attorney has refused  
registration under Section 2(d) of the Act on the ground

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that applicant's mark, when used in connection with applicant's services, so resembles the previously used mark MICROTECH for "highly polished finish sold as an integral part of metal fasteners, namely screws, bolts and washers"<sup>2</sup> as to be likely to cause confusion.

When the refusal was made final, applicant appealed. Applicant and the Examining Attorney filed briefs. Although applicant originally filed a request for an oral hearing, applicant subsequently withdrew the request.

The thrust of applicant's argument is that the cited mark is weak and entitled to only a narrow scope of protection. In making this argument, applicant contends that "the public is accustomed to encountering marks much closer in overall appearance and commercial impression and on goods even more closely related than those of applicant and the cited registration" (brief, p. 6), and that, in any event, the involved marks are not sufficiently similar to cause a likelihood of confusion. As to the goods and services, applicant asserts that "[they] are no more than remotely related." (brief, p. 8) Applicant has submitted copies of third-party registrations of MICROTECH and MICRO-

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<sup>1</sup> Application Serial No. 75/095,740, filed April 29, 1996, alleging dates of first use of August 12, 1992.

<sup>2</sup> Registration No. 1,633,679, issued February 5, 1991; combined Sections 8 and 15 affidavit filed.

TEC marks, including marks with variant spellings, covering a wide range of goods and services. Applicant also has relied upon a computerized printout of a directory, retrieved from the Internet, listing businesses using MICRO TEC (or various spellings thereof) as their trade name.<sup>3</sup>

The Examining Attorney maintains that the marks are similar, and that the goods and services are related in that both may be sold by the same entity under the same mark to the same classes of purchasers. In support of the refusal, the Examining Attorney submitted dictionary definitions of the terms "coat," "coating" and "finish," as well as excerpts, which deal with industrial fasteners, retrieved from the NEXIS database. The Examining Attorney also submitted copies of third-party registrations to show that goods and services of the types involved herein are marketed by a single entity under a single mark.

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<sup>3</sup> In addition to the just-mentioned materials which were properly made of record (exhibits A and B attached to the brief), applicant submitted exhibit C with its appeal brief. The exhibit apparently was retrieved from the Internet, the exhibit purportedly showing additional uses of MICRO TEC and variations thereof. The Examining Attorney, in her brief, has objected to the untimely submission of exhibit C.

Trademark Rule 2.142(d) provides, in relevant part, that the record should be complete prior to the filing of an appeal, and that the Board will ordinarily not consider additional evidence filed with the Board after the appeal is filed. Accordingly, the Examining Attorney's objection is sustained, and exhibit C does not form part of the record and has not been considered. We hasten to add that even if considered, the exhibit does not compel a different result in this appeal.

Our determination under Section 2(d) is based on an analysis of all of the probative facts in evidence that are relevant to the factors bearing on the likelihood of confusion issue. In re E. I. du Pont de Nemours & Co., 476 F.2d 1357, 177 USPQ 563 (CCPA 1973). In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods and/or services.

We find that the marks MICRO-TEC and MICROTECH are identical in sound and meaning, and substantially similar in appearance, engendering virtually identical overall commercial impressions. Although applicant, based on its remarks, takes issue with such a finding, the thrust of its position in this appeal is that the cited mark is weak and entitled to only a narrow scope of protection. However, even if applicant established that registrant's MICROTECH mark is a weak mark, registered marks which are weak are still entitled to protection. In connection with the weak mark argument, applicant submitted seventeen third-party registrations of MICRO-TEC and MICROTECH marks (and phonetic variations thereof) pertaining to a wide range of goods, but none of the registrations covers the specific types of goods or services involved in this appeal; and listings from a business directory database on the Internet

showing variations of MICRO-TEC and MICROTECH as trade names.<sup>4</sup>

Looking at the specific evidence submitted by applicant, we find that it falls short in persuading us to reach the result urged by applicant. In view of the significant differences between the good and services involved in this case and the goods recited in the third-party registrations relied upon by applicant, these registrations are not particularly probative of the strength or weakness of registrant's mark as it relates to finishes and coatings on metal. See, e.g., *Conde Nast Publications, Inc. v. American Greetings Corp.*, 329 F.2d 1012, 141 USPQ 249, 252 (CCPA 1964); and *Chemical New York Corp. v. Conmar Form Systems, Inc.*, 1 USPQ2d 1139 (TTAB 1986).<sup>5</sup> Further, as often stated, third-party registrations are not evidence that the marks shown therein are in use or

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<sup>4</sup> Applicant also submitted, with its March 13, 1997 response, a one-page copy of a computerized TRADEMARKSCAN search report indicating the existence of forty-one MICROTEC registrations. Inasmuch as applicant failed to furnish registration copies with the report, no probative value attaches to the report.

<sup>5</sup> Applicant places significant weight on the case of *National Cable Television Association Inc. v. American Cinema Editors, Inc.*, 937 F.2d 1572, 19 USPQ2d 1424 (Fed. Cir. 1991). Suffice it to say that, based on the record before us in this appeal, there is doubt that the marks involved here are in the same ubiquitous category as those referenced by the court in that case (PREMIUM, SUN, BLUE RIBBON, NATIONAL, GIANT or AMERICAN).

that the public is familiar with them, and the existence on the register of confusingly similar marks cannot aid an applicant in its effort to register another mark which so resembles a registered mark as to be likely to cause confusion. *AMF Inc. v. American Leisure Products, Inc.*, 474 F.2d 1403, 177 USPQ 268 (CCPA 1973), and *Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324, 153 USPQ 406 (CCPA 1967).

Considering the other evidence submitted by applicant in support of its contention that registrant's mark is a weak mark, the business directory listings are insufficient to warrant this conclusion. Listings of business names alone do not reveal the extent of use made by the listed third-party businesses; some of the businesses may have never gotten off the ground in any significant fashion, or quickly may have gone out of business; and some of the businesses may be small enterprises, in remote locations, that have affected only a minuscule portion of the purchasing public. According any significant probative value to this evidence here is complicated by the fact that the listings are completely silent as to the nature of the businesses. Other than the names of the businesses, the listed information comprises only addresses and phone numbers.

With respect to the goods and services, it is not necessary that they be similar or competitive, or even that they move in the same channels of trade to support a holding of likelihood of confusion. It is sufficient that the respective goods and/or services are related in some manner, and/or that the conditions and activities surrounding the marketing of the goods and/or services are such that they would or could be encountered by the same person under circumstances that could, because of the similarity of the marks, give rise to the mistaken belief that they originate from the same producer. In re International Telephone & Telegraph Corp., 197 USPQ 910, 911 (TTAB 1978). In the present case, we find that applicant's services of "applying protective coatings to metal" are related to registrant's "highly polished finish sold as an integral part of metal fasteners, namely screws, bolts and washers." As shown by the dictionary evidence, a "finish" is a type of "coating"<sup>6</sup>, and the Examining Attorney is correct in stating "[applicant] sells the metal coating service and [registrant] sells the coating sold as a part of metal goods." (brief, p. 7) Thus, the goods and

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<sup>6</sup> The dictionary definition of "finish" shows that the term means, in pertinent part, "the surface coating or texture of wood, metal, etc."

services would appear to travel in similar channels of trade to similar classes of purchasers.

In finding that applicant's services are related to registrant's goods, we have considered the five third-party registrations based on actual use in this country which the Examining Attorney has submitted.<sup>7</sup> The registrations show marks which, in each instance, are registered for both the types of services and goods involved in this appeal.

Although these registrations are not evidence that the different marks shown therein are in use or that the public is familiar with them, they nevertheless have probative value to the extent that they serve to suggest that the goods and services listed therein are of a kind which may emanate from a single source. See, e.g., *In re Albert Trostel & Sons Co.*, 29 USPQ2d 1783, 1785-86 (TTAB 1993); and *In re Mucky Duck Mustard Co. Inc.*, 6 USPQ2d 1467, 1470 at n. 6 (TTAB 1988).

Applicant also attempts to distinguish its services from registrant's goods by arguing that its coating services are for critical dimension tools while registrant's goods are essentially small hardware items.

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<sup>7</sup> The other six registrations are based on Section 44 of the Act. Inasmuch as there is no evidence of any use of these registered marks, they are entitled to less probative value.



The problem with this argument, as pointed out by the Examining Attorney, is that applicant's recitation of services does not include any restriction of the coating to critical dimension tools. Thus, applicant's metal coating services are presumed to cover the coating of hardware such as that sold under registrant's mark. Canadian Imperial Bank v. Wells Fargo Bank, 811 F.2d 1490, 1 USPQ2d 1813, 1815 (Fed. Cir. 1987)[ "[T]he question of likelihood of confusion must be determined based on an analysis of the mark as applied to the goods and/or services recited in applicant's application vis-à-vis the goods and/or services recited in [the] registration, rather than what the evidence shows the goods and/or services to be." ]

Lastly, to the extent that any of the points argued by applicant cast doubt on our ultimate conclusion on the issue of likelihood of confusion, we resolve that doubt, as we must, in favor of the prior registrant. In re Hyper Shoppes (Ohio), Inc., 837 F.2d 463, 6 USPQ2d 1025 (Fed. Cir. 1988); and In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289 (Fed. Cir. 1984).

We conclude that purchasers familiar with registrant's highly polished finish sold as an integral part of metal screws, bolts and washers under its mark MICROTECH would be likely to believe, upon encountering applicant's mark

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MICRO-TEC for applying protective coatings to metal, that the goods and services originated with or are somehow associated with or sponsored by the same entity.

Decision: The refusal to register is affirmed.

T. J. Quinn

H. R. Wendel

D. E. Bucher  
Administrative Trademark  
Judges, Trademark Trial  
and Appeal Board

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